U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 February 2006

Case No.: 2005-AIR-0031

In the matter of:

DEBBI SIMPSON,
Complainant,

v.

UNITED PARCEL SERVICE,
Respondent.

DECISION AND ORDER

This matter involves a dispute concerning alleged violations by the Respondent-employer, United Parcel Service, of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 et seq. (AIR21) and the regulations promulgated thereunder at 29 C.F.R. Part 1979. This statutory provision, in part, prohibits an air carrier, or contractor or sub-contractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions or privileges of employment because the employee provided to the employer or the federal government information relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration (FAA) or any other provision of federal law related to air carrier safety.

On June 13, 2005, Complainant Debbi Simpson filed a complaint with the Department of Labor against Respondent alleging that she was terminated from work in violation of AIR21 in retaliation for raising safety concerns. After conducting an investigation, the Assistant Secretary of Labor for Occupational Safety and Health dismissed Complainant's complaint for lack of merit. On September 12, 2005, Complainant timely filed a request for hearing under 49 U.S.C. 42121(b)(2)(A).

This matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on November 29, 2005. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs[1]. The following exhibits were received into evidence:

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[1] References to the record are as follows: Transcript: Tr.; Joint Exhibits: JX; Respondent's Exhibits: RX; Complainant's Brief: CB; Respondent's Brief: RB.

1. Joint Exhibit Numbers 1- 8 and
2. Respondent's Exhibit Numbers 1- 2.

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ISSUES

1. Whether Complainant engaged in protected activity as described in 49 U.S.C. § 42121;

2. If Complainant's activity is protected, did she suffer an adverse employment action;

3. If so, whether such activity was a contributing factor in Respondent's decision to issue a warning letter to Complainant;

4. If so, whether Respondent has established by clear and convincing evidence that Respondent would have issued a warning letter to Complainant absent her protected activity.

FINDINGS OF FACT

1. Respondent is a worldwide package delivery company which transports packages and cargo. Respondent maintains a place of business in West Columbia, South Carolina. Respondent is a person within the meaning of AIR 21.

2. Respondent hired Complainant as an aircraft mechanic. Complainant is an employee within the meaning of AIR 21.

3. Complainant has been employed with Respondent for 17 years. (Tr 7).

4. Whenever a mechanic is assigned to perform work on an aircraft, that mechanic is ultimately responsible for the safety of the aircraft. (Tr. 39).

5. On the evening of April 20, 2005, Complainant worked the night shift, from 10:00 p.m. until 8:00 a.m. During the early morning hours, UPS aircraft N122UP, an Airbus A300, arrived in Columbia from Louisville, Kentucky. (Tr. 8).

6. Complainant and Dave Rose received the aircraft. They learned from the flight crew that they had to use their oxygen masks because they couldn't pressurize the aircraft cabin. (Tr. 10, 44). The pilot had noted on the Aircraft Logbook that there was an issue with the #2 pressurization controller. (JX 3).

7. The cabin pressurization system has multiple built-in redundancies. The aircraft has two independent automatic control systems as well as a manual control system. It also has two independent outflow valves. The system is designed so that the aircraft is safe and legal to fly even if one of the two control systems is inoperative and even if one of the two outflow valves is inoperative – even if both conditions exist at the same time. The FAA has approved the A300 to fly in a condition where one of the two automatic control systems is inoperative while one of the two outflow valves is also inoperative. (JX 2, 4; Tr. 67-77).

8. When N122UP departed Louisville it was completely airworthy and safe, notwithstanding the fact that one of the pressurization controllers was inoperative and one of the outflow valves was inoperative. The manual control system was operative. (Tr 92-93; JX 2, 3).

9. At the time N122UP landed in Columbia both automatic control systems had discrepancies and N122UP could not be dispatch again until the discrepancies on one of the two automatic control systems was cleared. (Tr. 88). At approximately 7:00 a.m. Complainant told her acting supervisor, Rock Underwood, that N122UP was out of service. (Tr 11, 99).

10. Underwood instructed Complainant and Rose to attempt to return the aircraft to a status where it could be dispatched and requested that they continue working on the aircraft until the next shift arrived at 8:30 a.m. (Tr. 47, 99, 108).

11. When Underwood returned to the aircraft at 8:10 a.m., Complainant and Rose stated they had corrected the discrepancy on the #1 automatic control system. Complainant signed off on the aircraft logbook that the #1 automatic control system discrepancy had been corrected. (Tr 39; JX3, p.5). By signing the logbook, Complainant was representing that the discrepancy was removed and, as to that issue, the aircraft was airworthy. (Tr. 39, 52, 88-89).

12. At that time, one of the two automatic control systems was operative while one of the two outflow valves and the manual system were also operative. (JX3).

13. At 8:30 a.m. Underwood saw the logbook for N122UP and noted that the grounding discrepancy had been removed. He informed his manager, Skip; Cryer, that the aircraft could be dispatched. (Tr. 104, 109).

14. At 8:50 a.m. Underwood found Complainant in the cockpit of N122UP. He asked what she was working on. Complainant expressed concerns about the safety of the aircraft but did not specify anything in particular, but simply stated she thought the aircraft was "illegal" and had "too many deferrals." Underwood explained that the aircraft was properly configured and airworthy. He called Aircraft Maintenance Control (AMC) and allowed Complainant to talk to them. Complainant cut off the conversation with AMC. (Tr 20) At 8:58 a.m.Underwood instructed Complainant that the aircraft was green and instructed her to clock out. (Tr. 19, 104–114).

15. While Complainant expressed that she thought something was wrong or illegal with the aircraft, there is no evidence that she ever identified any particular problem.

16. Upon returning to the maintenance office, Underwood found Complainant talking to another employee. He again instructed her to clock out. Complainant replied that "maybe I should call the FAA." Underwood again instructed Complainant to clock out. As Complainant gave no indication that she was going to follow his instructions to clock out, Underwood reported the matter to Cryer. (Tr 21, 107-122).

17. Cryer approached Complainant and asked what was wrong with the aircraft. Complainant would only say that it was illegal in spite of Cryer asking what was illegal. Complainant did not explain anything and simply stated "I'm going to call the cops." Cryer stated, "Debbie, you need to punch out and go home right now." (Tr1-27, 123-124).

18. Several times over the next ten minutes Complainant was informed that she needed to clock out and go home. Complainant did not follow or even acknowledge the instructions. (Tr. 123-125, 132-134).

19. Complainant clock out at 9:18 a.m., approximately 20 minutes after she was first instructed to do so. ((Tr. 25).

20. On April 29, 2005, following a hearing with her union representative, Complainant was issued a warning letter for insubordinate behavior in not clocking out when instructed to do so. (Tr 26). There is no evidence that Respondent has ever tolerated an employee staying on property after being instructed to leave. Another employee was suspended for one week for similar misconduct. (RX 2).

21. When Respondent issues an employee a written warning, the warning letter remains in the employees file for nine months. During these nine months, the warning letter can be used for any progressive discipline. After nine months, the warning letter is retained but cannot be used for progressive discipline. (Tr. 140-141). There is no evidence that the warning letter had any effect on Complainant's compensation, terms, conditions, or privileges of employment.

22. There had been previous difficulties between Underwood and Complainant. (Tr 135).

23. Complainant's wage rate is $43.00 per hour. On April 20, 2005, after 8 a.m. Complainant was paid time and a half. (Tr 32).

LAW AND CONTENTIONS

AIR21 states that it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee: 1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) to the air carrier or the Federal government information relating to any violation or

alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 2) filed, caused to be filed, or is about to file (with any knowledge of the employer) a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 3) testified or is about to testify in such a proceeding; or 4) assisted or participated or is about to assist or participate in such a proceeding. 29 C.F.R. § 1979.102.

Under 49 U.S.C. § 42121(b) and 29 C.F.R. § 1979.109, to establish that a respondent has committed a violation of the employee protection provisions of AIR21, a complainant must prove by a preponderance of the evidence that an activity protected under AIR21 was a contributing factor in the unfavorable personnel action alleged in the complaint. Courts have defined "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way" the decision concerning the adverse personnel action. Marano v. United States Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993). The activities protected under 49 U.S.C. § 42121(a)(1) include reports of information to an employer or the Federal Government of a violation of a Federal law or FAA regulation, standard or order relating to air carrier safety. Based on these principles, to establish a violation of AIR21, a complainant must prove three elements: 1) protected activity; 2) unfavorable personnel action; 3) causation in terms of contributing factor. Each of these elements will be examined in turn to determine whether Complainant has established that Respondent committed an AIR21 violation.

Protected Activity

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, United States Department of Labor, has broadly defined "protected activity" as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." Minard v. Nerco Delamar Co., 92-SWD-2 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically. American Nuclear Resources v. United States Dep't of Labor, 143 F.3d 1292 (6th Cir. 1998), citing Bechtel Constr. Co. v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995). In other words, the complainant's concern must at least "touch on" the subject matter of the related statute. Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9, and Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient. Kesterton v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997).

A protected activity under AIR21 has three components. First, the report or action must involve a purposed violation of a Federal law or FAA regulation, standard or order relating to air carrier safety and at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his safety concern to either his employer or the Federal Government. 49 U.S.C. § 42121(a)(1).

I find that any belief that Complainant may have had concerning the safety of N122UP was not objectively reasonable. The only safety issue with N122UP concerned the pressurization controllers and the outflow valves. Complainant and Rose corrected the discrepancy. While Complainant expressed her concerns to Underwood that the aircraft was "illegal" and had "too many deferrals," the aircraft was in fact legal to fly and Complainant herself had signed off on the logbook indicating the aircraft was airworthy and safe. Underwood explained that the aircraft was properly configured and airworthy. He called AMC and allowed Complainant to talk to them. Complainant cut off the conversation with AMC. Given Complainant's inability even at the hearing of the case to articulate any specific concerns, given the fact that she signed the logbook indicating the discrepancy had been corrected and given the fact that both Underwood and AMC were advising that the aircraft was properly configured and airworthy, I find that any subjective belief that Complainant may have had that N122UP was "illegal" and had "too many deferrals" was not objectively reasonable. I find Complainant did not engage in protected activity.

Unfavorable Personnel Action

Section 42121(a) of AIR 21 proscribes employer retaliation, stating that no air carrier or contractor or subcontractor of an air carrier "may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment" because of the employee's protected activity. These provisions are the statutory foundation for the requirement that a complainant must show an "adverse employment action" as part of her case.

In the Fourth Circuit, in which this case arises, an adverse employment action requires actions having an adverse effect on the terms, conditions, or benefits of employment. *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) (downgrading of year-end performance evaluation not adverse employment action). In *James v. Booz-Allen & Hamilton*, 368 F.3d 371 (4th Cir. 2004), the Court held a negative performance evaluation was not an adverse employment action as it did not result a decrease in compensation, job title, level of responsibility, or opportunity for promotion. The Court held the negative performance evaluation only became an adverse employment action when "the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment." *James* at 377.

In *Robert West v. Kasbar, Inc./Mail Contractors of America, Inc.*, ARB No. 04-155 (Nov. 30, 2005), the Board held that a warning letter without tangible job consequences did not constitute an adverse action under the employee protection provisions of the Surface Transportation Assistance Act (STAA). The STAA prohibits discrimination "regarding pay, terms, or privileges of employment." 49 U.S.C.A. § 31105(a)(1)(A).

Based on this precedent it is clear that in the Fourth Circuit the warning letter issued to Complainant is not an adverse employment action under AIR 21. There is no evidence that the warning letter had any effect of Complainant's compensation, terms, conditions, or privileges of employment. There is no evidence that Respondent has subsequently used the warning letter as a basis to detrimentally alter the terms or conditions of Complainant's employment. While the

warning letter will stay in Complainant's employment file, after nine months the warning letter cannot be used for progressive discipline.

I find the warning letter issued to Complainant did not constitute an adverse employment or an unfavorable personnel action under AIR 21.

Protected Activity as Contributing Factor in Adverse Employment Action

To establish discrimination under AIR21, Complainant must also prove by a preponderance of the evidence a connection between his protected activity and the unfavorable personnel action. As there is no evidence of protected activity or of an unfavorable personnel action, I need not reach this issue.

CONCLUSION

Complainant having failed to establish that she engaged in protected activity or that she was subjected to an unfavorable personnel action, I hereby dismiss his complaint with prejudice.

ORDER

The complaint of Debbi Simpson is hereby **DISMISSED**.

So ORDERED.

A

LARRY W. PRICE
Administrative Law Judge

LWP/lpr
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is

filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).